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October 22, 2002

VIA EMAIL AND HAND DELIVERY

The Honorable Kathleen Sheehy
Administrative Law Judge
Office of Administrative Hearings
100 Washington Square, Suite 1700
Minneapolis, MN 55401-2138

Re: Amendment of Environmental Quality Board
Power Plant Siting Rules – Chapter 4400
OAH Docket No. 58-2901-15002-1

Dear Judge Sheehy:

Please accept the following reply comments of the Minnesota Transmission Owners.

1. It is not appropriate to include reference to MEPA and MERA in Part 4400.3050 – Standards and Criteria.

The Sierra Club and the Minnesota Center for Environmental Advocacy ("MCEA") urge that a specific reference to the Minnesota Environmental Rights Act ("MERA") and the Minnesota Environmental Policy Act ("MEPA")[1] be incorporated by reference into part 4400.3050 – the provision under which the EQB will base its decision on applications for site and route permits. It appears that the EQB Staff is inclined to agree with these comments, at least in part.[2] The Sierra Club and the MCEA believe it necessary to incorporate reference to MEPA and MERA to provide a "substantive standard" by which the EQB will approve or deny permit applications. As proposed by the Sierra Club, the rule would read as follows:

[1] Minnesota Statutes Chapters 116B and 116D, respectively.

[2] *See* EQB Staff Suggested Changes to Minnesota Rules Chapter 4400, dated October 11, 2002, and EQB Staff Suggested Changes to Minnesota Rules Chapter 4400, dated October 18, 2002.

Part 4400.3050 STANDARDS AND CRITERIA.

No site permit or route permit shall be issued in violation of the site selection standards and criteria established in Minnesota Statutes, sections 116C.57, ~~and~~ 116C.575 and 116D.04, and in rules adopted by the board. The board shall issue a permit for a proposed facility when the board finds, in keeping with the requirements of the Minnesota Environmental Policy Act, Minnesota Statutes chapter 116D, and the Minnesota Environmental Rights Act, Minnesota Statutes chapter 116B, that the facility is consistent with state goals to conserve resources, minimize environmental impacts, and minimize human settlement and other land use conflicts and ensures the state's electric energy security through efficient, cost effective power supply and electric transmission infrastructure.

The Minnesota Transmission Owners strongly disagree with the recommendations of the Sierra Club and the Minnesota Center for Environmental Advocacy ("MCEA") to incorporate by reference Minn. Stat. §116D.04 specifically, and chapters 116B and 116D generally, into the standards and criteria under which the EQB will review large energy facility site and route applications. Rather than clarify matters, incorporation of references to these statutes into the rule will undoubtedly lead only to more ambiguity and costly, protracted litigation.

As originally proposed, the draft rule properly includes the standards and criteria for site and route permits that "must" be used by the EQB. These standards and criteria are specifically established by the legislature in its adoption of the 2001 Energy Security and Reliability Act. Those provisions are codified at Minn. Stat. §116.57, subd. 4 and, for the EQB's "alternative" permitting process, at Minn. Stat. §116.575, subd. 8. To add, via an administrative rulemaking, new standards and criteria for the permit issuance decision is contrary to the legislature's intent in adopting both of these statutes, and is both unneeded and unreasonable.

The recommendation suffers several infirmities. First, Minn. Stat. § 116D.04 – which establishes procedures for the development of environmental assessment worksheets and environmental impact statements ("EISs") – has thirteen subdivisions to it. Is it the Sierra Club's position that each of these subdivisions is applicable to the EQB's review and decision on an application for a high voltage transmission line or power plant? This certainly cannot be the case because an EIS – while required for projects that fall under the purview of the "full" permitting process – is not required for projects that proceed through the "alternative permitting process" beginning at proposed rule 4400.2000. Projects processed under the alternative process need only require an "environmental assessment" – a lesser, but presumably adequate, form of environmental review. Incorporating a reference to Minn. Stat. § 116D.04 into a rule that specifically contemplates the review of projects using something other than an EIS immediately calls into question the validity of the proposed rule itself.

In their comments, the Sierra Club and MCEA cite to the *PEER* decision, wherein the court finds that the legislature did not intend the Power Plant Siting Act to preempt MEPA.

People for Environmental Enlightenment and Responsibility v. Minnesota Environmental Quality Council, 266 N.W.2d 858, 865 (Minn. 1978). While that may have been the case in 1978, that certainly isn't true in 2001, at least with respect to the EQB's new alternative permitting authority established under the Energy Security and Reliability Act. That Act makes clear that with respect to the alternative option available to utilities, the "*environmental assessment* shall be the only state environmental review document required to be prepared on the project." Minn. Stat. § 116C.575, subd. 5 (2001)(emphasis added). An "environmental assessment" is not to be confused with the similarly termed "environmental assessment worksheet" under MEPA. An environmental assessment worksheet is a "brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action." Minn. Stat. § 116C.04, subd. 1(c). An environmental assessment under Minn. Stat. § 116C.575, subd. 5 and Chapter 4400, on the other hand, is a separate, independent assessment of environmental issues associated with a proposed large electric power facility. As the proposed rules clarify, the environmental assessment "must be the only state environmental review document required to be prepared by the EQB" and "[n]o environmental assessment worksheet or environmental impact statement shall be required." Proposed rule, part 4400.2750, subp. 8. Because MEPA – which requires environmental impact statements and environmental assessment worksheets in certain cases – has no further application to permit applications filed under Minn. Stat. § 116C.575, its incorporation by reference into proposed rule part 4400.3050 is simply an incorrect application of the law and, as such, will lead to unnecessary confusion and litigation.

Second, incorporating MEPA and MERA into the EQB rules is hardly going to add "clarity and certainty" to the EQB's decision-making process. Instead, it will only increase the likelihood of ambiguity and litigation in the permit process. The addition of Minn. Stat. §116D.04 to the site or route permitting criteria will allow the environmental review process to be litigated as part of the permitting decision, *in addition to* possible litigation arising from the environmental review adequacy decision. In a very real sense, incorporating references to MEPA and MERA into the proposed rule simply provides potential litigants a second bite at the apple in contesting EQB permit decisions – the first contesting that a project failed to satisfy the standards set forth in Minn. Stat. §§ 116C.57, subd. 4 and 116C.575, subd. 8; the second contesting that the project failed to adhere to MEPA and MERA. This hardly seems to comport with the comprehensive regulatory and environmental review scheme set out in the 2001 Energy Security and Reliability Act - one that sought to avoid unnecessary duplication and delays in the permitting process, not add to it.

We also disagree with MCEA's assertions that (1) all "stakeholders" have become familiar with the application of Minn. Stat. § 116D.04, (2) that the statute no longer remains open to subjective interpretation, and (3) that MEPA and MERA standards have been consistently applied by state agencies. If this were true, one would reasonably expect very little litigation regarding environmental review. A cursory review of recent appellate cases, however, points to just the opposite. It is just short of remarkable to point out, for instance, that since 1990 the Minnesota Supreme Court has issued no less than five decisions interpreting

MEPA, with its most recent case just this year. *See, Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency,* 644 N.W.2d 457 (Minn. 2002); *State by Schaller v. County of Blue Earth,* 563 N.W.2d 260 (Minn. 1997); *Carl Bolander and Sons Co. v. Minneapolis*, 502 N.W.2d 203 (Minn. 1993); *State by Archabal v. County of Hennepin*, 495 N.W.2d 416 (Minn. 1993); *Winona v. Minnesota Pollution Control Agency,* 449 N.W.2d 441 (Minn. 1990).

In addition, the Minnesota Court of Appeals – in 2002 alone – has already issued another five decisions interpreting MEPA. *See, Minnesotans for Responsible Recreation v. Dep't of Natural Res.*, 651 N.W.2d 533 (Minn. Ct. App. 2002); *O'Neill v. Minn. Pollution Control Agency*, No. C7-01-2049 (Minn. Ct. App. July 2, 2002), (LEXIS 779); *Mittelstadt v. Martin County*, No. C3-01-1335 (Minn. Ct. App. June 18, 2002) (LEXIS 724); *Kramer v. Otter Tail County Bd. of Comm'rs.*, 647 N.W.2d 23 (Minn. Ct. App. 2002); *Minn. Ctr. for Envtl. Advocacy v. Big Stone County Bd. of Comm'rs.*, 638 N.W.2d 198 (Minn. Ct. App. 2002). Many other recent appellate cases have involved interpretation of MERA, MEPA's "sister law." *See e.g.*, *Citizens for a Safe Grant v. Loan Oak Sportsmen's Club*, 624 N.W.2d 796 (Minn. Ct. App. 2001). The state's district courts regularly get involved in controversies over the interpretation of both MEPA and MERA. The reason for so much litigation is *precisely because of* the very subjective nature of both MEPA and MERA.

Both MEPA and MERA include broad prohibitions against any conduct that has caused or is likely to cause "pollution, impairment, or destruction" of a natural resource. "Pollution, impairment, or destruction" is defined, in turn, only as any conduct that violates or is likely to violate an environmental permit or standard, or any conduct that "materially adversely affects or is likely to materially affect the environment." Minn. Stat. § 116B.02, sub. 5; Minn. Stat. § 116D.04, subd. 1(a). In determining whether an action is likely to "materially adversely affect the environment," Minnesota courts look to no less than four different criteria.[3] Each of these criteria, however, is entirely dependent on the facts and circumstances of the specific case. As a result, the criterion – and therefore the MEPA/MERA standard itself – does not at all lend themselves to a "bright line" for decision-making. Far from it.

Also, given the subjective nature of both MEPA and MERA, it is also incorrect to assert, as MCEA does, that the statutes have been consistently applied by state agencies. *See e.g.*, MCEA Initial Comments at 4. One recent example involves litigation regarding the development of the Giant's Ridge Golf Course in Biwabik, Minnesota. In that case, the Iron Range Rehabilitation Resources Board (an independent state agency) and the Minnesota Department of Natural Resources each had significantly different interpretations regarding the necessity and quality of environmental review, resulting in protracted litigation. *Iron Rangers for Responsible Ridge Action v. Iron Range Resources,* 531 N.W.2d 874 (Minn. Ct. App. 1995)(review denied).

[3] These four factors include but are not limited to (1) whether the natural resource is rare, endangered, or has historical significance, (2) whether the resource is easily replaceable, (3) whether the proposed action has any significant consequential on other resources, and (4) whether the direct or consequential impact will affect a "critical number." *See e.g., State Ex. Rel. Wacouta Twsp. v. Brunkow*, 510 N.W.2d 27, 30 (Minn. Ct. App. 1993).

Last, it would be illogical to require the EQB *to make a specific finding* – as is required under the Sierra Club and MCEA proposal – that the proposed site or route is "in keeping with [MERA]." Minnesota Statutes Chapter 116B – the Minnesota Environmental Rights Act – provides a right for any person to bring a civil action for protection of the "air, water, land, or other natural resources" from "pollution, impairment or destruction." Minn. Stat. § 116B.03, subd. 1. If this provision is included in the standards and criteria section of the proposed rule, the EQB would somehow need to find, prior to issuing any permit, that the project is in keeping with the requirements of a statute that provides for a right of civil action against persons who are polluting or impairing the environment. Such a finding is impossible to make, as the right of a person to bring a claim under MERA is wholly independent from the EQB's decision on a site or route permit.

The Transmission Owners readily agree that the aim of every decision ought to be to "harmonize the need for electric power with the equally important goal of environmental protection." *PEER*, at 865. We also fully agree that *"to the fullest extent practicable* the policies, rules and public laws of the state shall be interpreted and administered in accordance with [MEPA]." Minn. Stat. 116D.03, subd. 1 (emphasis added). We strongly disagree with the proposition, however, that MEPA and MERA – established as broad overarching schemes for environmental review and enforcement – were ever intended to be used in the mechanistic or wooden fashion that the Sierra Club and MCEA now urge. MEPA and MERA are not tools that were intended to be employed governmental bodies as a handy checklist in their decision-making processes. It simply isn't that easy. If it were, every "policy, rule and law of the state" – because they too must be interpreted "in accordance with" these broad laws – would similarly be required to incorporate by reference both MEPA and MERA. That, of course, is wholly irrational.

2. <u>In enacting Minn. Stat. § 116C.53, subd. 2, the legislature specifically intended to preclude parties from re-litigating issues related to the *need* for a large energy facility</u>.

Both the Sierra Club and MCEA argue that the EQB rules should be amended so that parties in site and route permit proceedings may have the opportunity to re-litigate issues that were previously addressed in the certificate of need proceeding under the jurisdiction of the Public Utilities Commission. In other words, the MCEA and Sierra Club seek the ability to include in EQB site/route proceedings what the legislature specifically sought to exclude – i.e., questions of type, timing, and alternative system configurations. The MCEA, at page 9 of its comments, puts it this way: "In determining whether a project is compatible with the proposed site or route, the EQB should only be precluded from considering issues that *have been expressly considered* during the [certificate of need] process." Emphasis added. Such a result is clearly inconsistent with the statute.

Minn. Stat. § 116C.53, subd. 2 provides as follows:

> When the public utilities commission has determined the need for the project under 216B.243 or 216B.2425, questions of need, including size, type, and timing; alternative system configurations, and voltage are not within the board's siting and routing authority and must not be included in the scope of the environmental review conducted under sections 116C.51 to 116C.69.

The statute couldn't be clearer. The statute is not an "if, then" proposition. It does not provide that "if" the public utilities commission *specifically addresses* issues of need, "then" issues of size, type, timing, alternative system configurations, and voltage are excluded from the EQB's environmental review. It simply, and plainly, states that when the PUC has issued a certificate of need for a particular energy facility, questions that go to the need of the project are off limits in the EQB siting and routing process. To read the statute in the manner urged by the Sierra Club/MCEA requires one to presume a qualification that does not exist. Such an interpretation would manifestly violate two fundamental canons of statutory construction: (1) that all statutes are to be given their plain and unambiguous meaning, and (2) when the words of a law in their application to an existing situation are clear and free from ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit. Minn. Stat. § 645.16.

Not only is the Sierra Club's and MCEA's proposal unsupported by the statute's plain language, the consequences of such an interpretation would be protracted fights over the quantity and, and more importantly, the *quality* of the PUC's analysis in determining need. Under the Sierra Club's interpretation, just exactly who would get to decide whether the PUC has actually considered and determined questions of need, including size, type, and system configuration? And how would that inquiry proceed? Does the Sierra Club and the MCEA envision a pre-hearing, wherein the first thing required by the EQB are legal briefs by interested parties on the question of whether the PUC, in its separate CON hearing, did or did not analyze a particular question of need, along with comment on the quality of the PUC's analysis? Obviously, such an exercise would be highly inefficient and duplicative of the PUC's exhaustive CON process.

With due respect to the Sierra Club and the MCEA, what they seek here is exactly what they state that they do not seek – a second bite opportunity to re-litigate the PUC's decision to grant a certificate of need to a large energy facility. In drawing a definitive demarcation between the need decision to be made by the PUC, and the siting/routing decision to be made by the EQB, the legislature specifically sought to avoid such duplication. To the extent that the Sierra Club and the MCEA are worried that the PUC will fail to address important questions of need in CON proceedings, including a review of all reasonable project alternatives, it is incumbent on them to actively participate in that process. It is inappropriate, however, to have a second bite at the apple.

3. EQB Staff October 11, 2002 Suggested Changes.

On October 11, 2002 the EQB Staff sent out its EQB Staff Suggested Changes to Minnesota Rules 4400 (the "10/11 Suggested Changes"). At that time, the EQB Staff clarified that interested parties would have the opportunity to comment on the 10/11 Suggested Changes in the October 22, reply comments. As a result, the Transmission Owners withheld review of the 10/11 Suggested Changes until after October 15. We now comment on those changes.

a. Rule 4400.1350 – NOTICE OF PROJECT.

Subpart 2 – notification to persons on the general list, to local officials, and to property owners.

Part 4400.1350 requires that a permit applicant provide notice of the application to various persons and governmental officials. In our initial comments, the Transmission Owners clarified that EQB rules are not meant to require review of alternatives to the "proposed project" but rather is limited to review of alternative "sites" or "routes" of the proposed project. This is a huge distinction. The EQB agrees and is prepared to clarify this very important distinction in the rules.

On October 18, 2002, the EQB Staff provided interested parties with a "pre-screening" review of the reply comments it was intending to file with the ALJ. In its comments, the EQB clarified that its scope of review is limited to a review of alternative *sites or routes*, and does not include a review of alternatives to the high voltage transmission lines or power plants themselves. However, in reviewing the EQB Staff's proposed October 18, 2002 rule, part 4400.1350, subpart 3(E) – dealing with the content of notice – it appears that a further clarification is in order. As proposed by EQB Staff, rule 4400.1350, subpart 3(E) provides as follows:

> **Subp. 3. Content of notice.** The notice mailed under subpart 2 shall contain the following information.
>
> (E) The manner in which the EQB will conduct environmental review of the proposed project, including the holding of a scoping meeting at which additional alternatives to the project may be proposed.

For the same reasons as outlined in our October 15 Comments, and as agreed to by the EQB Staff in its 10/11 Suggested Changes, part 4400.1350, subpart 3(E) should be amended as follows:[4]

[4] In discussion with Al Mitchell, the Director of the EQB's Power Plant Siting Program, the EQB Staff is prepared to clarify this point in its reply comments. Thus, to the extent that EQB Staff makes the clarification, our discussion on this issue is largely moot. However, we wanted to raise the issue in the event that the clarification did not make its way into EQB Staff's reply comments.

(E) The manner in which the EQB will conduct environmental review of the proposed project, including the holding of a scoping meeting at which additional alternatives to the proposed site(s) or route(s) ~~project~~ may be proposed.

b. Rule 4400.5000 – Local Review of Proposed Facilities.

Subpart 5 – Environmental Review.

The EQB Staff has proposed that a local unit of government that maintains jurisdiction over a proposed project shall prepare an environmental assessment. Citing to Minn. Stat. §§ 116C.57, subd. 2c , and 116C.576, subd. 1(a) for support, the EQB Staff, at page 19 of its 10/11 Suggested Changes, states that the "statute requires preparation of an environmental assessment regardless of whether it is the EQB or a local unit of government that issues a permit for the project." This does not appear to be the case.

Minnesota Statute § 116C.576, subd. 1, provides as follows:

(a) *Notwithstanding the requirements of sections 116C.57 and 116C.575*, an applicant for a site or route permit for one of the projects identified in this section shall have the option of applying to those local units of government that have jurisdiction over the site or route for approval to build the project. If local approval is granted, a site or route permit is not required from the board. If the applicant files an application with the board, the applicant shall be deemed to have waived its right to seek local approval of the project.

(Emphasis added). It says nothing about an environmental assessment, as opposed to 116C.57, subd. 2(c), which specifically requires one. Subparagraph (b) of § 116C.576, subd. 1 goes on to provide, in part:

If the local units of government maintain jurisdiction over the project, the board shall select the appropriate local unit of government to be the responsible governmental unit to conduct *environmental review* of the project.

(Emphasis added).

The concern on the part of the Transmission Owners has to do with the distinction between an "environmental assessment" – which is to be performed by the EQB under the statute – and "environmental review" – which left to be performed by local units of government. As discussed earlier, an environmental assessment is required to be preformed by the EQB as part of the alternative permitting process. The rules lay out specific requirements for what must be included as part of that analysis. Proposed rule, part 4400.2750, subp. 4. Our concern is that by requiring local governments to also perform an "environmental assessment" – as opposed to

merely requiring that local units of government perform a minimal level of environmental review – there is likely to be confusion over whether the local units' environmental review measures up in sum and substance to the EQB's requirements for an environmental assessment.

Local units of government, possessing independent police powers to regulate land use within their boundaries, may employ a number of different land use control measures to review an application by a utility for a local permit. That may take the form of a specific local ordinance dealing with utility facilities, or it may be more broad controls such as a conditional use provision that can apply equally to several different types of commercial development, ranging from shopping centers to dog kennels to utility facilities, etc. The point is that local units of governments are in the best position to decide how and under what circumstances it will review requests for utility and other development proposals.

This is not a case of utilities simply seeking to avoid environmental review at the local level, far from it. The fact is that some local units of government may employ more sophisticated procedures for environmental review is beside the point. But by requiring that local units of government perform an "environmental assessment," essentially a defined term in the rules - as opposed to requiring the local unit to perform "environmental review" – as determined by the local units of government – undoubtedly leaves open the question of who gets to decide whether the local unit's "environmental review" measures up the EQB's "environmental assessment?"

The Transmission Owners appreciate that the EQB Staff, in partial acknowledgment of the issue, has proposed to delete the phrase in subpart 5 "in accordance with the requirements of part 4400.2750." The EQB Staff has recognized that the local units of government can establish – with certain caveats – their own procedures for conducting environmental review. However, we believe that in order to preserve local unit of governments' autonomy as recognized under Minn. Stat. § 116C.576, subd. 1, subpart five should be further amended, as shown in bold:

> Subp. 5. **Environmental review.** A local unit of government that maintains jurisdiction over a qualifying project shall prepare an environmental assessment on the project ~~in accordance with the requirements of part 4400.2750.~~ **Environmental review by local units of government constitutes preparation of an environmental assessment.** The local unit of government shall afford the public an opportunity to participate in the development of the scope of the environmental assessment before it is prepared. Upon completion of the environmental assessment, the local unit of government shall publish notice in the EQB Monitor that the environmental assessment is available for review, how a copy of the document may be reviewed, that the public may comment upon the document, and the procedure for submitting comments to the local unit of government. The local unit of government shall provide a copy of the environmental assessment to the EQB upon completion of the document. The local unit of government shall not make a final decision on the permit until at

least ten days after the notice appears in the EQB Monitor. If more than one local unit of government has jurisdiction over a project, and the local units of government cannot agree on which unit will prepare the environmental assessment, any local unit of government or the applicant may request the board to select the appropriate local unit of government to be the responsible governmental unit to conduct an environmental review of the project.

This simple change will preserve local governmental control over how they wish to process utility land use applications and avoid potential confusion and disputes between local units and the EQB, as is likely under the current draft.

Thank you for the opportunity to comment. Should you have any questions, please do not hesitate to contact me at the above number.

Very truly yours,

LINDQUIST & VENNUM P.L.L.P.

Todd J. Guerrero
Attorneys for the Minnesota Transmission Owners

TJG/sa

c: Alan Mitchell, Environmental Quality Board (by email and regular mail)
MEQB Service List (by email)